

TANZANIA / JUDGMENT

mathew kampambe vs vodacom tanzania limited 2021 tzhcld 508 26 november 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DIVISION AT DAR ES
SALAAM REVISION APPLICATION NO. 345 OF 2020 BETWEEN MATHEW
KAMPAMBE.....APPLICANT AND VODACOM TANZANIA
LIMITED.....RESPONDENT

JUDGMENT

Date of last order: 22/11/2021 Date of judgment: 29/11/2021 B.E.K. Mganga, J On 27th June 2013 respondent employed the applicant to the position of Value-Added Service (VAS) Executive-content & application. Their employment relation went well until on 31st January 2018, when applicant was suspended on ground that he committed gross dishonest. On 8th March 2018 applicant appeared before the disciplinary hearing committee to face the charges of gross dishonest as it was alleged that on 30th January 2018, he (applicant) approached Premier Mobile Solution, Vodacom vender, and solicited bribe worth USD 22,000. On 19th March 2018 the disciplinary hearing found the applicant guilty as a result, he was terminated. Aggrieved with termination, on 17th April 2018 applicant referred Labour dispute No. CMA/DSM/KIN/R.431/18 to the Commission for Mediation and Arbitration hereinafter referred to as CMA claiming to be paid twenty-four months' salary compensation for unlawful termination, severance, general damage all amounting to TZS. 302,367,653/= and monthly salary from the date of termination to the date of determination of the dispute. On 13th July 2020, P.M. Chuwa, Arbitrator issued an award ordering that termination was fair both substantively and procedurally. The arbitrator awarded the applicant to be paid TZS 7,442,307/= as salary for 19 days he worked for the month of March 2018 and one-month salary in lieu of notice in accordance with the termination letter. Further aggrieved by the award, applicant filed a notice of application supported by an affidavit seeking to revise the said award. In the affidavit in support of the notice of application, applicant raised seven

(7) grounds namely: -

1. That the said award is tainted with fatal irrationality, illogical and irregularities leading to injustice to the applicant.

2. The Honorable Arbitrator erred in law by failing to analyze and scrutinize evidence brought forward by parties.
3. The Honorable arbitrator erred in law and fact by holding that the respondent had valid and fair reasons for terminating employment of the applicant. 2
4. The Honorable arbitrator erred in law and fact by holding that all procedures for termination was well observed by the respondent before terminating the applicant.
5. The Honorable arbitrator erred in law and fact by not awarding the applicant the reliefs on the reasons that termination of the applicant was substantively and procedurally fair.
6. The Honorable arbitrator erred in law and fact by holding that termination of the applicant was substantively and procedurally fair.
7. The Honorable arbitrator erred in law and fact by holding that applicant admitted to have committed disciplinary offence. The respondent resisted the application and filed both a notice of opposition and a counter affidavit of Mark Daniel Tindamanyire, advocate. In the counter affidavit, the deponent deposed that the award issued is reasonable and in accordance with the law and that the same was supported by evidence. When the application was called for hearing, Ms. Bertha Kitambi, advocate, appeared and argued for and on behalf of the applicant while Mr. Juvenalis Ngowi, advocate, appeared and argued for and on behalf of the respondent. MS. Kitambi, advocate opted to argue ground No. 1, 2 and 7 together and submitted that arbitrator failed to analyze and scrutinize evidence as a result held that applicant admitted at the disciplinary hearing that he committed the alleged misconduct. Counsel submitted that there is no evidence showing that applicant admitted to have taken 3 bribe. She went on that arbitrator wrongly relied on exhibit D2, which, did not prove the alleged misconduct. She argued that there is no evidence both at CMA and at the disciplinary hearing as the alleged messages found in the phone of Alex were not tendered and as the said Alex did not testify. It was argued further on behalf of the applicant that, no print out of the messages were tendered. Counsel complained that arbitrator shifted burden of proof to the applicant instead of the respondent. Counsel for the applicant argued ground No. 3, 4 and 6 together and submitted that there is no proof that applicant took bribe from Alex Obadienda, the business partner of the respondent because the email (exhibit. D1) was received in violation of section 18 of the Electronic Transaction Act, 2015 as there was no affidavit of authentication. Counsel cited the decision of this court in the case of Christina Thomas v. Joyce Justo Shimba, PC. Civil Appeal No. 84 of 2020 to bolster her argument. Counsel submitted that respondent did not abide by Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 as no investigation report was served to the applicant and also not tendered in evidence. Counsel cited the case of Severo Mutegeki V. Mamlaka ya Maji safi na Usafi wa mazingira Mjini Dodoma (DUWASA), Civil Appeal No. 343 of 2019 4 (unreported) to support her argument that it is mandatory for the investigation report to be served upon an employee. Counsel went on that respondent acted not judiciously by failure to serve the investigation report to the applicant and that that

amounted to denial of right to be heard at the disciplinary hearing. She cited the case of Simon Manyaki v. the Institute for Finance management [1984] T.L.R 304 to support her argument. She further cited the case of Exim Bank(T) Ltd v. Jacqueline Kweka, Revision No. 429 of 2019, Higher Education Student's Loan Board v.Yusufu Kisare, Consolidated Revision No. 755 of 2018 and 858 of 2018 wherein it was held that failure to give an employee investigation report violates the rules of fair hearing. It was submitted further on behalf of the applicant that disciplinary hearing conducted on 8th March 2018 was adjourned to 12th March 2018 but did not resume, thereafter on 19th March 2018, applicant was served with termination letter. That, applicant was asked to mitigate on 8 th March 2018 contrary to Rule 13(7) of GN. 42 of 2007, supra. On ground No. 5 counsel for the applicant submitted that applicant is entitled to 12 months compensation and other remedies. Mr. Isaac Lupi, counsel for the respondent argued the application generally. On validity of reasons for termination, he submitted that 5 applicant was charged for gross misconduct of demanding bribe of USD 22,000 from Alex Kobalyenda owner of Premier Mobile Solutions, the partner of the respondent. He submitted further that investigation that was conducted by Joseph Nyume (DW1) established that applicant solicited bribe from the said Alex Kobalyenda and that this was not the first time. That this was proved by emails (exhibit. D1) and a snapshot showing transactions of bribe (exhibit. D2). Counsel submitted that DW1 testified that he saw the messages relating to TZS 400,000/= from Alex Kobalyenda to applicant in the former's phone. Counsel conceded that the said Alex Kobalyenda did not testify due to what is alleged as respondent's policy. Mr. Lupi, counsel for the respondent submitted further that there were misconducts, and that applicant was charged with, and found guilty. Counsel submitted that applicant admitted at CMA that he received money from the business partner of the respondent. That, although applicant argued that the said money was a gift or contribution to his marriage, he was supposed to disclose, but he did not, as a result it was concluded that it was bribe. On failure to serve the applicant with investigation report, counsel for respondent submitted that applicant did not raise it as an issue prior to his termination as such he cannot raise it now. On procedure for 6 termination, counsel for the respondent submitted that the same was adhered to as testified by DW2 who tendered exhibits D3 to D9. Counsel for respondent submitted that on 8th March 2018 disciplinary hearing was adjourned to 12th March 2018 for the original M-Pesa transactions to be tendered. Counsel concluded that applicant was afforded right to be heard and that evidence was analyzed by the arbitrator. He therefore prayed the application be dismissed. I have carefully examined evidence that were adduced at CMA and rival submissions by counsels and find the issue is whether termination of employment of the applicant was fair both substantively and procedurally and what relief(s) parties are entitled to. In addressing those issue, I will start with whether termination was fair substantively. In other words, whether there were valid reasons for termination. It is undisputed that employment of the applicant was terminated based on alleged gross dishonest of soliciting bribe of USD 22,000 on 30th January 2018, from premier Mobile Solutions, a business partner of the respondent. Termination letter (Exhibit D9) is clear that applicant's employment was terminated on gross misconduct. The said letter reads:- "RE: NOTICE OF TERMINATION OF THE EMPLOYMENT 7 Reference is

made to the above title and the disciplinary hearing held on 9th & 12th March 2018 in which you were found guilty of Gross Dishonest. As a result of being found guilty of gross dishonest, the employer employee relationship has been damaged and trust broken down irreparably. In the circumstances, Vodacom regrets to inform you that it has terminate your employment effective on 19th March 2018. Following this termination you will be entitled to:

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- i) Salary up to March 19, 2018 ii) One month salary in lieu of notice. iii) Accrued leave days but not taken". In order to appreciate the nature of gross dishonest the applicant was charged with, and on which he was found guilty, one need to examine the charge itself in the disciplinary hearing record (exh. D8). Summary of allegations against the respondent in the said disciplinary hearing reads:- "on 30th January 2018 it was reported that the employee approached Vodacom Vendor (Premier Mobile Solutions) and solicited bribe worth \$22,000 which he termed as facilitation fee prior to various product launch such as story portal while the employee knew that there was no such requirement from Vodacom. The count is gross dishonest". The issue is whether the respondent proved at the balance of probability that on 30th January 2018 applicant solicited \$22,000 from Premier Mobile Solution. 8 Two witnesses namely Joseph Michael Mnyune (DW1) and Alice Lewis (DW2) testified on behalf of the respondent with the bid to prove the above allegations against the applicant. DW1 tendered email communications not authored by himself nor copied/ addressed to him to show that applicant solicited bribe from Alex J. Kobalyenda, the managing Director of Premier Mobile Solutions. DW1 testified that he saw messages in the phone of the said Alex J. Kobalyenda during investigation but did not take them or tender them in evidence at CMA. He relied on M-Pesa two transactions (exh. D2) valued at TZS 400,000/= and TZS 200,000/= dated 13th April 2015 and 7th April 2017 as evidence of solicitation of bribe by the applicant from the said Alex J. Kobalyenda. DW1 conceded while under cross examination that in the emails (exhibit D1) there is no email from the applicant to the respondent to prove that applicant solicited bribe. On the other hand, DW2 testified that she participated in the disciplinary hearing. While under cross examination, DW2 is recorded stating that no witness was called to the disciplinary hearing to prove that applicant solicited bribe from Alex J. Kobalyenda. In short, neither the investigator nor the said Alex J. Kobalyenda testified in the disciplinary hearing. On his part, Mathew Sam Kampambe (PW1) denied all allegations put forward against him. He testified that, the alleged TZS 400,000/= 9 were contribution from the said Alex J. Kobalyenda as the applicant was preparing for marriage ceremony as the said Alex J. Kobalyenda is a friend of the applicant's brother. PW1 testified that TZS 200,000/= was received on personal arrangements. As pointed above, in the alleged email, there is no email from the applicant soliciting bribe from the said Alex J. Kobalyenda who, incidentally, did not testify. That being the case, all allegations that applicant solicited bribe from Alex J. Kobalyenda remain to be hearsay. Counsel for the respondent relied upon the two M-Pesa transactions to show that applicant solicited bribe from Alex J. Kobalyenda. In my view, that cannot prove the allegation. The reason is clear that, the alleged gross dishonest according to the charge that was put forward against applicant, shows that the incidence occurred on

30th January 2018 and not before. It was argued that applicant was supposed to declare to his boss the aforementioned amount he received from Alex J. Kobalyenda and that non declaration proves that he committed the misconduct charged. With due respect, that assumption also is not correct as there was no charge relating to non-declaration that is in violation of the respondent's internal policy. 10 I have carefully examined the emails allegedly containing evidence that led the respondent to be charged for gross dishonest and later on his employment terminated and find that it raises some suspicion questions to its integrity etc. As correctly conceded by DW1, there is no email from applicant soliciting bribe. In absence of applicant's email, there cannot be connection between applicant and those emails (exh.D1) as nothing was mention in evidence the mode used by the applicant to solicit the alleged bribe. The more disturbing issue is, who was the initiator of the alleged emails. Going by evidence of DW1, it can be quickly concluded that it was Alex J. Kobalyenda. But my careful examination of the said emails (exh. D1) has turned to the contrary. It appears that on Tuesday 30th January 2018 10:39 am, Paulina Shao from Vodacom wrote Dear Alex I am sending this email to get your confirmation on the allegation towards one of my employee who had requested for compensation fees to get your service implemented ...Looking forward for a response as soon as possible. Regards. Shao, Paulina. The said email had neither email address of the sender nor that of the receiver. It seems it was edited, or else respondent knows what happened. In my view, its originality and authenticity are questionable. 11 On the same date i.e., Tuesday 30th January 2018 5:20 PM, md@premiermobile.co.tz wrote to Paulina Shao the subject matter being claim on compensation fees for service connection to Vodacom. In the said email, the author wrote:- "... as discussed, we have been facing difficulties to deliver our services to your organization due to challenges we face working with some of your team members...we have been approached 3 times to guarantee pay-outs to MK so that our services (story Box) can get a nod and integrated (usd 22,000 being the requested amount as down payment)... Regards. Alex J Kobalyenda. As I have pointed above, the charge against the applicant was not proved as a result his termination was substantively unfair. Having found that there was no valid reason for termination, I don't see any need for myself to go in detail to discuss fairness of procedure. I therefore allow the application. Now what is the relief(s) the parties are entitled to. In CMA F. 1, applicant indicated that he was claiming to be paid twenty-four months' salary compensation for unlawful termination, severance, general damage all amounting to TZS. 302,367,653/=. In his evidence he testified that his monthly salary was TZS 4,300,000/=. I therefore award him to be paid 12 months compensation i.e. TZS 51,600,000/= in addition to the 7,442,307 he was awarded as one month salary pay I 12 lieu of notice and 19 days salary he worked for march 2018. For avoidance of doubt, applicant is entitled to be paid TZS 59,042,307 in total, subject to P.A.Y.E. deductions that will be made by the Tanzania Revenue Authority officials. B.E.K. Mganga JUDGE 26/11/2021 13

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